

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

AREZOU MANSOURIAN, LAUREN
MANCUSO, NANCY NIEN-LI CHIANG,
and CHRISTINE WING-SI NG; and all
those similarly situated,

Plaintiffs,

No. CIV S-03-2591 FCD EFB

vs.

BOARD OF REGENTS OF THE
UNIVERSITY OF CALIFORNIA AT
DAVIS, et al.,

ORDER

Defendants.

18 This case was before the undersigned on November 14, 2007, for hearing on defendants'
19 motion for a protective order. George Acero appeared as defense counsel and Whitney Huston
20 and Monique Olivier appeared as plaintiffs' counsel. Having considered all submitted papers
21 and oral argument, and for the reasons stated at the hearing and as set forth below, defendants'
22 motion is denied.

23 This action is proceeding on the complaint filed on December 18, 2003. Plaintiffs'
24 claims have been limited by the recent ruling of Judge Frank C. Damrell, Jr. on defendants'
25 motion for judgment on the pleadings. The remaining claims involve plaintiffs' claims under
26 Title IX for ineffective accommodation and emotional distress. Plaintiffs are former female

1 students at the University of California, Davis, who participated in, or planned to participate in,
2 the University's intercollegiate wrestling program. However, actions by the University and its
3 staff later limited wrestling opportunities for women, which gave rise to the present action.

4 After initiating this action, the parties determined that it was closely related to another
5 action then pending against the University, i.e., *Burch v. Board of Regents of the Univ. of Davis*,
6 Case No. 2:04-cv-0038 WBS GGH ("Burch"). Because counsel believed the factual and legal
7 issues in both cases were very similar, they agreed to conduct parallel discovery in both actions.
8 Although the cases were never formally designated as related under the Local Rules for purposes
9 of assignment to the same judge, the court-endorsed stipulations by the parties effectively
10 merged discovery in the two cases. More specifically, the parties agreed that they could use
11 documents produced in one case to prosecute or defend either case. This stipulation was
12 approved and entered as an order both by Judge Damrell in this case on October 12, 2004, and
13 by Magistrate Judge Gregory G. Hollows in the *Burch* case on June 15, 2004.¹

14 That stipulated, court-endorsed order provides that the parties

15 believe that the factual and legal issues in *Mansourian v. Regents of the*
16 *University of California, et al.*, (E.D. Cal. Case No. Civ. S-03-2591 FCD/PAN)
17 and *Burch v. Regents of the University of California, et al.*, (E.D. Cal. Case No.
18 Civ. S-04-038 WBS/GGH) overlap. The parties also believe that the discovery in
the two cases will overlap. Accordingly, . . . the parties, through their counsel
hereby stipulate and agree that . . . the *parties may use documents produced in*
one case to prosecute or defend either case, subject to the Federal Rules of
Evidence.

19 See Stipulation and Order, Doc. no. 32 in *Burch*, (as endorsed by Judge Damrell) (emphasis
20 added).

21 During the *Burch* case, defendants were ordered by Judge William B. Shubb to produce
22 several documents that they argued were privileged. Judge Shubb then granted in part
23 defendants' motion to reconsider that order, and agreed to conduct an *in camera* review of the
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25 ¹ The order endorsed by Judge Damrell in this case was filed in the *Burch* case, and
26 appears in the docket as document no. 32.

1 purportedly privileged documents. Upon conducting that review and after considering the
2 briefing by both parties, Judge Shubb ultimately determined that the defendants had waived any
3 privileges as to those documents, and again ordered their production. In making this
4 determination, he relied on the Ninth Circuit's holding in *Burlington Northern & Santa Fe Ryw.*
5 *Co. v. U.S. Dist. Court*, 408 F.3d 1142, 1149 (9th Cir. 2005), *cert. denied*, 546 U.S. 939 (2005),²
6 and concluded that defendants had waived all privileges given their long, six-month delay in
7 producing a privilege log. Defendants' petition to the Ninth Circuit for relief from the order was
8 denied. The defendants subsequently produced the documents, but did so pursuant to a
9 stipulated protective order governing the terms of production and use of the documents. That
10 order specifically provided that the documents "shall be used only for the purpose of the
11 prosecution, defense, or settlement of this ("Burch") action and the related action for which
12 discovery is merged, *Mansourian v. Regents*, 03-2591 FCD PAN." The language could hardly
13 be clearer in its contemplation that the documents shall be used in this action.

14 This brings us to the present dispute, where defendants now attempt to re-assert the same
15 privileges as to those very documents ultimately produced in *Burch*, and to withhold them from
16 use in this action. In essence, defendants ask this court to reverse or disregard Judge Shubb's
17 order regarding waiver of the asserted privileges, and to vacate the subsequent protective order
18 reaffirming the parties' agreement that discovery documents in the other case may be used in this
19 case. Defendants cite to a number of cases to support their argument that they may reclaim the
20 privilege based on the involuntary nature of the production. In particular, defendants rely on
21 *Transamerica Computer Co. v. IBM Corp.*, 573 F.2d 646 (9th Cir. 1978). The cases they rely on
22 address the accidental or inadvertent disclosure or production of privileged documents. They

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24 ² In *Burlington Northern*, the Ninth Circuit set forth guidelines for determining waiver
25 where the party asserting a privilege fails to timely produce a privilege log pursuant to Fed. R.
26 Civ. P. 26(b)(5). *Burlington Northern*, 408 F.3d at 1149. In that case, the Court found waiver
where the withholding party was a sophisticated corporation that did not provide a privilege log
until five months after its initial responses to discovery requests were due. *Id.*, at 1149-50.

1 have no application here.

2 In *Transamerica Computer* the Ninth Circuit reviewed the district court's order requiring
3 accelerated production of over 17 million documents, which resulted in the inadvertent disclosure
4 of privileged documents. The Court wrote that "under the specific circumstances of the
5 accelerated discovery proceedings. . . , [the producing party's] inadvertent document . . . of some
6 privileged documents does not constitute a waiver . . . , for that production was made without
7 adequate opportunity to claim the privilege." *Id.*, at 651. The court's conclusion regarding
8 waiver was contingent upon the producing party's lack of an adequate opportunity to claim it.
9 *Id.*, at 652.

10 Here, the documents were not accidentally released. They were produced pursuant to a
11 court order after the defendants litigated and lost a disputed discovery motion seeking the
12 production of the documents. Moreover, unlike the party in *Transamerica Computer*, defendants
13 here, in the context of the *Burch* case proceedings, had numerous opportunities to assert
14 privilege as to the contested documents. Specifically, defendants had previously identified the
15 purportedly privileged documents but withheld them for months without producing a privilege
16 log. They were ordered to produce them, but obtained reconsideration of that order. When,
17 upon further review, production was again ordered defendants had the opportunity to appeal to
18 the Ninth Circuit. Moreover, the district judge in *Burch* allowed defendants to produce the
19 documents pursuant to a protective order defendants themselves helped fashion, and which
20 explicitly contemplated use of the documents in this case.

21 Defendants' attempt to liken these circumstances to the inadvertent disclosure that
22 occurred in *Transamerica* is unavailing. Defendants shall be bound by the terms of the
23 previously entered protective orders in this action and in the *Burch*.

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1 Accordingly, defendants' motion for a protective order deeming the documents unusable
2 in this litigation is denied.

3 SO ORDERED.

4 DATED: November 19, 2007.


5 EDMUND F. BRENNAN
6 UNITED STATES MAGISTRATE JUDGE
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